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No. 89-954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTEDORO-WHITNEY CORPORATION,
Petitioner,

v.

MARSH-MCBIRNEY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN REPLY TO OPPOSITION OF RESPONDENT MARSH-MCBIRNEY, INC.

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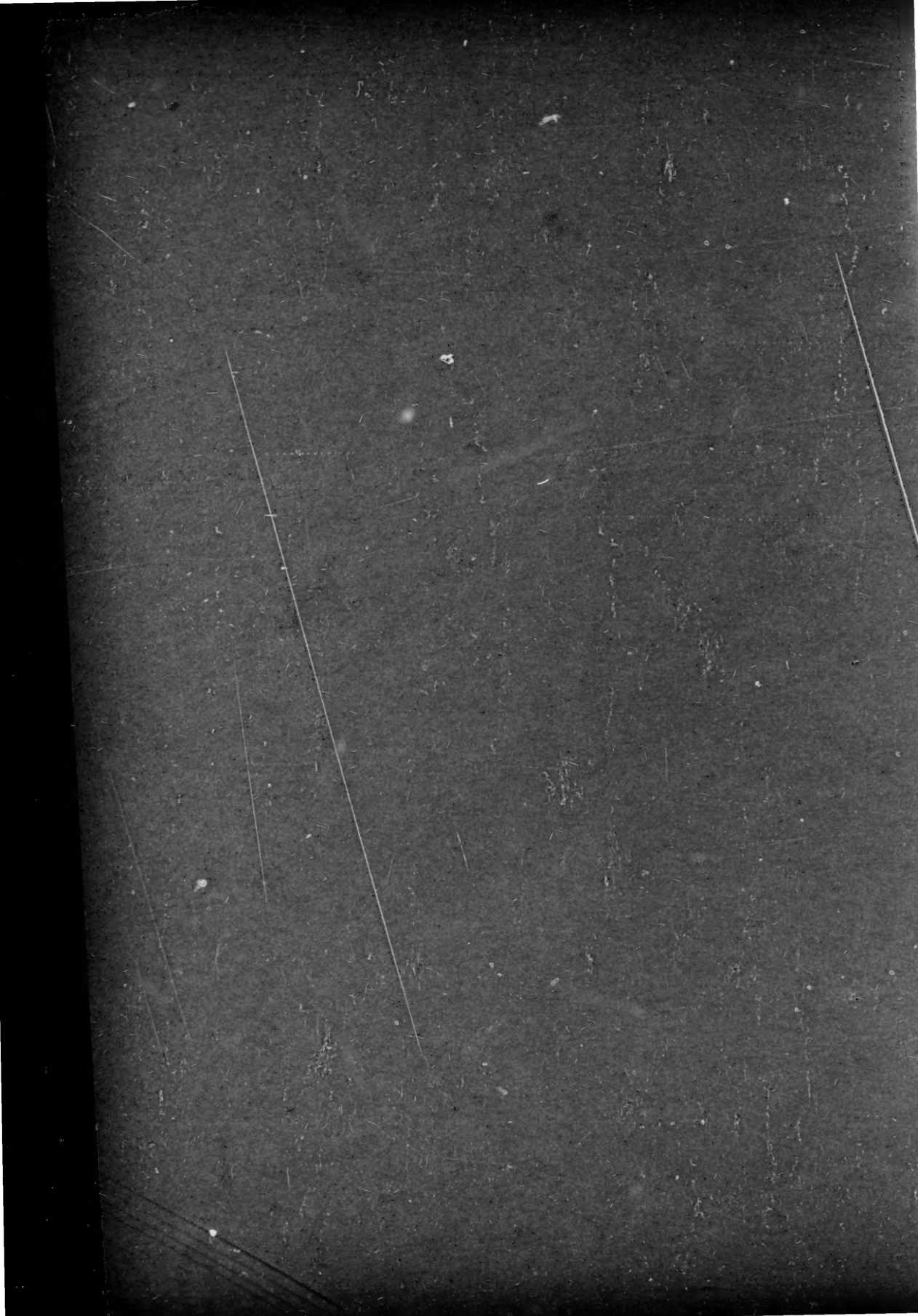

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RESPONSE TO RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Petitioner, Montedoro-Whitney Corporation, makes the following response to the Counterstatement of the Case submitted in respondent's opposition to the petition.

1. Respondent characterizes the district court's decision to hear and decide all liability issues in the case prior to the receipt of any evidence on damages as a reordering of proofs. Respondent states that such

reordering is the court's prerogative in a bench trial. Respondent's characterization is irrelevant. The district court, in fact, did hear and decide all liability issues rendering a decision on liability on March 16, 1988.

Respondent then argues that petitioner "managed to litigate further yet further liability issues" after March 16, 1988. Respondent's Brief (Res. Br.) at p.2. This contention is incorrect. The district court stated all its factual findings and conclusions of law on liability under Fed. R. Civ. P. 52 in trial sessions ending on March 16, 1988. Thereafter, the district court focused exclusively on the question of damages. The decision on liability rendered under Fed. R. Civ. P. 52 on March 16, 1988 was incorporated in the final judgment without modification. As respondent itself indicates at Res. Br., p.2., the district court stated in its final judgment that "all findings of facts and conclusions of law previously announced by the court are hereby made final findings of facts and conclusions." Plainly, then, the district court announced decision on all issues presented by the parties *prior to the entry of judgment*. See, Petition, p. 18a, 22a. Thus, in spite of respondent's implications, the decision on liability in this case was announced on March 16, 1988.[1]

2. Contrary to respondent's contention, the Federal Circuit did hold that it had no *jurisdiction* over

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[1] The district court's denial of petitioner's motion to bifurcate is not at issue here. See, Res. Br., p. 2-3. Petitioner has not argued here that the notices of appeal filed prior to April 25, 1988 were timely filed, i.e., were not premature. Petitioner is only contending that those notices should be considered validated under Fed. R. App. P. 4(a)(2)

petitioner's liability appeals. The Federal Circuit held that the timing of notices of appeal was jurisdictional and cannot be waived. Petition, p. 6a. The Federal Circuit further held that petitioner's premature appeals were not saved under Fed. R. App. P. 4(a)(2). Petition, p. 9a. The lower court then specifically concluded, based on petitioner's jurisdictional argument before that court, that it was *without jurisdiction* to hear petitioner's appeals on liability.

Respondent urges that petitioner insisted that its liability appeal could *only* be heard in connection with the premature appeals and did so as a litigation tactic. Respondent further contends that petitioner's brief in the timely appeal was limited to damages only. Res. Br., p. 3. Respondent is simply not correct. Petitioner made a good faith argument that its premature appeals were timely filed but made no statement, in its jurisdictional statement or elsewhere in its principal brief, that its timely appeal was limited to the damages issues. Based on its view as to the timeliness of its first appeals, petitioner made an argument respecting the timeliness of respondent's cross-appeal. However, in advancing this alternative argument, it did not limit the *scope* of any appeal brought below. In fact, the jurisdictional statement in petitioner's principal brief below made statements directly to the contrary.[2]

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[2] All appeals below were consolidated. Each party filed only one principal brief, each of which contained alternative arguments on jurisdiction and the merits of the appeals. Respondent's statement that the district court warned petitioner that its premature appeals were violative of 28 U.S.C. § 1927 is incorrect. The district court simply made no such statement. The reference in Federal Circuit's opinion is based on the court's vague response to a statement of respondent's counsel.

ARGUMENT

1. Petitioner's appeal on liability should have been saved under Fed. R. App. P. 4(a)(2)

Respondent states that petitioner had a valid appeal in which to raise the liability issues and yet chose not to do so. Therefore, respondent urges that this court should not address the scope of the savings clause in Fed. R. App. P. 4(a)(2) in this case because the present litigant did not need to be saved.[3]

Even if this argument were correct, it is irrelevant. In the lower court, petitioner had every right to rely upon the savings provision of Fed. R. App. P. 4(a)(2) when requesting that the Federal Circuit hear its liability appeals. Petitioner's jurisdictional argument regarding respondent's cross-appeal should not act as a bar to petitioner's reliance on this rule. The Federal Circuit has misapplied the savings provision of Fed. R. App. P. 4(a)(2) and this court should correct the Federal Circuit's error in denying petitioner a hearing on the merits.

Respondent, without substantive argument, concludes that the district court's findings of facts and conclusions of law were neither a decision nor an order as required under Fed. R. App. P. 4(a)(2). Respondent's basis for this contention is that without the entry of a Fed. R. Civ. P. 54(b) order, such findings and conclusions were "non-final" and remained subject to revision. This contention is a statement of the minority position expressed in *United States v. Hansen*, 795 F.2d 35 (7th Cir. 1986); *General Tele-*

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[3] Respondent's comments on 28 U.S.C. § 1292(c)(2) can be ignored since the operation of that statute is not at issue here.

vision Arts, Inc. v. Southern Ry. Co., 725 F.2d 1327 (11th Cir. 1984) and the present case, *Marsh-McBirney, Inc. v. Montedoro-Whitney Corp.*, 882 F.2d 498 (Fed. Cir. 1989). The entry of a Fed. R. Civ. P. 54(b) order is not required for the savings provision of Fed. R. App. P. 4(a)(2) to be effective. When Fed. R. App. P. 4(a)(2) was adopted in 1979, the Advisory Committee clearly intended that it encompass decisions which were not final but which were subsequently entered as a basis for the court's judgment. Fed. R. App. P. 4(a)(2) Advisory Committee Note, *reprinted in*, Federal Judicial Procedure and Rules (1989). The majority of circuits have permitted a notice of appeal filed after the announcement of a decision or order on (1) liability or (2) less than all claims in a case to be *effective* upon the entry of that decision or order as *part of the final judgment. Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc.*, 876 F.2d 353 (4th Cir. 1989); *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185 (9th Cir. 1986); *Leonard v. United States*, 633 F.2d 599 (2nd Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

The question of whether a Fed. R. Civ. P. 54(b) order is required to permit an appeal to be saved under Fed. R. App. P. 4(a)(2) is an issue which has caused considerable confusion internally within the minority view. Contrary to respondent's argument, most circuits do not consider the entry of Fed. R. Civ. P. 54(b) order a requirement under Fed. R. App. P. 4(a)(2) to validate an otherwise premature appeal. *Tidler v. Eli Lilly & Co.*, 824 F.2d 84 (D.C. Cir. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177 (7th Cir. 1989). The question of finality under Fed. R. Civ.

P. 54(b) and its inconsistent treatment in *Hansen* and *General Television* indicates how ill-considered those cases are. *Hansen* adopts the view that a *final judgment* must be announced to satisfy the requirements of Fed. R. App. P. 4(a)(2). 795 F.2d at 37. *General Television* similarly holds that Fed. R. App. P. 4(a)(2) only validates an announced final judgment. 725 F.2d at 1331. The Federal Circuit has adopted this view. 882 F.2d at 503. Thus, in the minority view, absent a decision disposing of all claims and all issues in a case, the savings provision of Fed. R. App. P. 4(a)(2) is inapplicable. The Seventh Circuit, unconvincingly, attempts to distinguish the situation where a decision on less than all claims has been announced and no Fed. R. Civ. P. 54(b) certification has been entered.[4] The Seventh Circuit very feebly states that in such case, mere certification is required to effect an appeal. However, under Fed. R. Civ. P. 54(b), *absent certification*, the court's disposal of less than all claims is obviously *subject to revision* until certification is made. Thus, any such decision is not final. The *Hansen* decision never comes to grips with this inconsistency.

Petitioner submits that when the majority view is properly considered, the inconsistency which so troubles the Seventh Circuit in *Hansen* is of no moment. The proper view is that a decision which becomes a part of the final judgment can be appealed through a premature notice filed after the announcement of such decision. In the present case, the district court completely announced its liability findings prior to the

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[4] The Seventh Circuit must distinguish the Fed. R. Civ. P. 54(b) situation because of its own contrary precedent. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, supra.

first premature appeal and its decision on damages prior to the second premature appeal. The district court's liability and damages decisions were then incorporated in its final judgment. Clearly, this was a circumstance in which petitioner's appeal on the merits should have been heard. In spite of its allegations of "unscrupulous litigation tactics", respondent never contends that it was prejudiced by the premature appeals. Respondent also does not contend, because it cannot, that the district court's or the Federal Circuit's disposition of the case was ever disrupted by the premature appeals. The present case is precisely the situation for which Fed. R. App. P. 4(a)(2) was designed, i.e., to save a mistakenly filed premature appeal so that petitioner can be heard on the merits. The Federal Circuit's strained ruling, denying petitioner its right to be heard on the merits, should be reversed.

2. This court should exercise supervisory authority over the Federal Circuit

Respondent asserts that the present case is not controlled by *Foman v. Davis*, 371 U.S. 178 (1972) because the issue before this court is not the proper construction of a post-judgment notice of appeal. Respondent's argument should be rejected.

In the present case, petitioner filed a valid notice of appeal which the Federal Circuit held restricted to the damages issue only. The Federal Circuit's basis for this holding was that petitioner made an *argument* concerning the validity of respondent's cross-appeal. Petitioner knows of no authority for the Federal Circuit's holding that a jurisdictional argument can act as an *estoppel* as to the scope of a valid notice of appeal. The Federal Circuit's holding that a valid no-

tice of appeal can be construed narrowly is directly contrary to this court's holdings in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) and *Foman, supra.* See, also, *Marres v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-379 (1985).

Petitioner made a good faith argument respecting respondent's cross-appeal based on petitioner's view as to the timeliness of its first two appeals. The Federal Circuit's use of petitioner's alternative argument to defeat petitioner's appeals on the merits is a throwback to nineteenth century pleading practice in which a party could not advance alternative positions. The Federal Circuit's narrow view should be rejected.

CONCLUSION

The issues which this case raises under Fed. R. Civ. App. P. 4(a)(2) have been fully briefed in the papers now before the court. The Federal Circuit's error is manifest. The case is ripe for summary disposition under Sup. Ct. R. 16.1. Petitioner notes that such summary disposition was used in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) and *Acosta v. Louisiana Dept. of Health & Human Resources*, 478 U.S. 251 (1986). Such disposition is appropriate here.

For the reasons herein stated, petitioner respectfully requests that the petition for a writ of certiorari be granted and the Federal Circuit's refusal to hear petitioner on the merits be reversed.

Respectfully submitted,

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